

Subject: Orca CH Comments

From: Brent Plater <bplater@biologicaldiversity.org>

Date: Mon, 14 Aug 2006 11:36:55 -0700

To: orcahabitat.nwr@noaa.gov

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CENTER FOR BIOLOGICAL DIVERSITY

SAN FRANCISCO BAY AREA OFFICE

August 14, 2006

National marine Fisheries Service
orcahabitat.nwr@noaa.gov

RE: Comments on the proposed critical habitat for Southern Resident Killer Whales

Dear Ms. Brix:

On behalf of the Center for Biological Diversity (“the Center”), I am writing to provide comments on the National Marine Fisheries Service’s (“NMFS”) proposed rule to designate critical habitat for the Southern Resident Killer Whale, *Orcinus orca*, in Puget Sound. 71 Fed. Reg. 34,571 (June 15, 2006). The Center also concurs in the comments submitted by Ocean Advocates, and hereby joins those comments as well.

These comments focus on a single issue: NMFS has illegally restricted its ability to designate killer whale habitat as unoccupied critical habitat, by suggesting that only those areas potentially occupiable by whales are somehow critical to killer whales. As explained below, there is no support in the Endangered Species Act or its implementing regulations for this position, and NMFS should therefore revise its proposed rule to protect unoccupied critical habitats.

1. NMFS has improperly restricted its ability to designate unoccupied critical habitats.

The Endangered Species Act explains that a species’ “critical habitat” includes both occupied and unoccupied areas, but establishes different criteria for designating the two types of critical habitats. For example, to designate critical habitat in areas occupied by the species, NMFS must find that “physical or biological features” within the area are both “(I) essential to the conservation of the species and (II) [] may require special management considerations or protection” 16 U.S.C. § 1532(3). However, to designate critical habitat in areas unoccupied by the species at the time it was listed, NMFS need only find that “such areas are essential for the conservation of the species.”

Thus, Congress has provided NMFS with a more lenient evidentiary standard for designating unoccupied critical habitats in two ways. First, NMFS need not specify physical or biological features within the unoccupied area to be protected; NMFS need only find that the unoccupied area—not the physical or biological features within the area—are essential to the

conservation of the species.¹ Second, NMFS need not find that the unoccupied area may require special management considerations or protection: such a requirement only applies to the designation of occupied critical habitats.

In some cases the Fish and Wildlife Service and NMFS have explained that, despite the lenient standards for designating unoccupied critical habitats for protected species, the regulations implementing the Endangered Species Act contain additional restrictions on designating unoccupied critical habitats that prevent designating unoccupied areas as critical habitat. However, this interpretation misconstrues the requirements of the regulations, and violates a principle of statutory and regulatory construction: regulations must be interpreted in a way that is consistent with the statute from which they arise.

For example, the regulations governing the designation of critical habitat state that NMFS “shall consider” the physical and biological features that are essential to the imperiled species in question and that may require special management conditions. 50 C.F.R. § 424.12(b). Similarly, the regulations provide that NMFS “shall focus” on the principle biological or physical constituent elements within an area that are essential to the conservation of the species. Id. However, while NMFS must consider and focus on said features and elements, the regulations do not preclude NMFS from designating unoccupied critical habitat areas that do not contain these features and elements; if the regulations were interpreted in such a manner, they would be expressly inconsistent with the requirements of the statute itself. Instead, these regulations describe what NMFS must consider during the designation process, but do not preclude NMFS from designating critical habitat without these features and elements.

The ESA implementing regulations also state that NMFS “shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.” 50 C.F.R. § 424.12(e). But again, this regulation can only be read as a simple restatement of the statute’s requirements: if any area outside the area currently occupied by the killer whale is “essential for the conservation of the species,” designation of only those areas currently occupied by the species as critical habitat is by definition “inadequate” to ensure the conservation of the species. To read this regulation in any other manner would unduly and illegally restrict NMFS’ ability to protect unoccupied areas as critical habitat, including areas that are essential to the reproductive life cycle of the Southern Residents’ main prey, salmon.

It is important to keep in mind that protecting a species’ critical habitats provides great benefits to the species and encourages its recovery. Studies in peer-reviewed literature have shown empirically that species with their critical habitats protected are twice as likely to be

¹ This difference makes perfect sense in terms of recovery efforts for critically imperiled species. More often than not, one would expect that the reason a species no longer occupies all of its historic range is because something has altered those portions of its historic range that the species no longer occupies. For example, anthropogenic land use changes may alter former habitats in such a way that the area’s physical and biological features essential to the imperiled species no longer exist. However, that area may still be essential to the conservation, i.e., the recovery, of the species, as the area may be needed to bring the species back to its historic abundance or to provide essential habitat features such as breeding grounds for prey species. If NMFS were required to find that these areas currently contain physical or biological features essential to the species before designating the area as critical habitat, then recovery and habitat restoration efforts would be impeded.

recovering as those species that do not have their critical habitats protected. Taylor et al., BioScience 55(4):360-367, April 2005. However, for a particular critical habitat designation to provide additional benefits to species, it must be designed and implemented effectively. NMFS' current proposal does not provide adequate protections to areas that should be quickly and easily designated as unoccupied critical habitat. If this is not remedied in the final rule, killer whale recovery will be impeded and the statutory directive for NMFS to conserve this imperiled whale will be subverted.

Thank you for the opportunity to provide comments on this proposed rule. If you have any questions about critical habitat, please feel free to contact me at any time.

Sincerely,

A handwritten signature in black ink that reads "Brent Plater". The signature is written in a cursive, flowing style with a horizontal line extending from the end of the name.

Brent Plater